93-1313

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICIA L. WHITE,

Petitioner

v.

ANTHONY FRANK, Postmaster General,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

1. Whether the Postal Service's practice of giving lighter duty work to non-pregnant employees temporarily disabled by on-the-job injuries, but denying such work to female employees temporarily disabled by pregnancy but similar in their ability or inability to work is a violation of the Pregnancy Discrimination Act provisions of Title VII of the Civil Rights Act of 1964, as amended?

2. Whether the Fourth Circuit, in conflict with nine other circuits, properly reversed the district court's finding of intentional discrimination, which was supported by evidence constituting a *prima facie* case of discrimination and disbelief by the finder of fact that the Postal Service's proffered reason for its denial of lighter work to the plaintiff was the real reason, because of the absence of additional independent evidence that the employer's proffered reason was false?

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ANTHONY FRANK, POSTMASTER GENERAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Patricia L. White, by her attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. 1a-9a, 20a) and district court (App. 10a-19a) are unpublished.

JURISDICTIONAL STATEMENT[1]

The court of appeal's judgment was entered on October 18, 1993. (App. 1a). A timely petition for rehearing was denied by order entered on November 15, 1993. (App. 20a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

1. Section 701(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e(k), provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

---

[1]There is no parent or subsidiary company to be listed pursuant to Supreme Court Rule 29.

2. Section 703 of Title VII, 42 U.S.C. 2000e 2(a), provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer---
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's. . . sex. . . or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities...because of such individual's. . . sex. . . .

3. The Guidelines on Discrimination Because of Sex of the Equal Employment Opportunity Commission provide:

> Written or unwritten employment policies and practices involving matters such as commencement and duration of leave, the availability of extensions . . . shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.

29 CFR 1604.10 (b).

> Any fringe benefit program . . . which does not treat women affected by pregnancy, childbirth, or related conditions the same as other persons not so affected but similar in their ability or inability to work must be in compliance with the provisions of [section] 1604.10(b) by April 29, 1979.

29 C.F.R. 1604.10 (d)(1).

STATEMENT

1. *Basis of Federal Jurisdiction in the District Court.* The district court's jurisdiction was based upon 28 U.S.C. 1331 and 1343 and upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The Plaintiff claimed she was discriminated against during her employment with the Postal Service on the basis of her pregnancy in violation of Title VII of the Civil Rights Act of 1964 as amended. 1 J.A. at 16.

2. *The Undisputed Facts of Record.*

a. *Background.* The Petitioner, Patricia White, is an African American female, college graduate, and a long term employee of the Postal Service. 3 J.A. at 380, 383, 387, 392, 442, 470, 473-75. Her three pregnancies occurred in 1985, 1986 and 1988, while she was a rural letter carrier at the Annapolis Maryland United States Post Office on Legion Avenue. Id.

There are four distinct crafts within the Postal Service all of which have separate unions and bargaining agreements. As a rural letter carrier, Ms. White was a member of the rural carrier craft; however, during the relevant period she was qualified to work as a clerk or letter carrier because she had passed the relevant examination. 3 J.A. at 381-82, 383, 564-65.

Rural Carrier White generally worked over 40 hours per week and was required to make deliveries in the heat or cold, lift heavy mail, and drive a bumpy jeep. 3 J.A. at 380-81, 397.

Charles Saylor was the Postmaster of the Annapolis Office from 1985 until 1988 and had supervisory responsibility over Ms. White's Station. 3 J.A. at 659-60. The rural carrier craft was under Richard Muller's direction. 3 J.A. at 694-95. Rural Carrier White's immediate supervisor was George Stallings.

Rural Carrier White was an "excellent rural carrier" before she left to have her children and after she returned. 3 J.A. at 133, 139, 381, 672-73.

b. *Light and Limited Duty.*

The Postal Service "defines and uses" two basic types of "officially assigned duty requiring less exertion than the employee's normal duties." 2 J.A. at 368. The Postal Service "defines and uses" the term "limited duty" as lighter duty "occasioned by [an] on-the-job injury" and "light duty" as lighter duty "occasioned by an injury or condition other than an on-the-job injury." *Id.*

The National Rural Letter Carriers Association had a National Agreement (Agreement) with the Postal Service which governed the craft from 1984 to 1988. 2-3 J.A. at 300, 305, 665. Article 13 of the Agreement provides (2 J.A. at 307):

> Sec. 1
>
> The Employer will make an effort to assist employees who through occupational injury or occupational illness are unable to perform their regularly assigned duties. This effort will consist of possible assignment to limited duty work if such is available.
>
> Sec. 2
>
> ....the parties will make every effort to insure that employees with job-related illnesses are returned to duty subject to their medical restrictions.
>
> Sec. 3
>
> In the rural carrier craft, at any local installation, regular rural routes shall not be considered for any light duty assignment.

Postmaster Saylor testified that the Agreement was interpreted by the Postal Service so that no light duty was allowed to rural carriers. 3 J.A. at 667-69. The Agreement also defined

auxiliary assistance as "a temporary means of providing relief, and permanent relief is to be arranged as soon as practicable." 2-3 J.A. at 306, 665.

c. *Evidence of Denials of Lighter Duty Assignments to Ms. White.* Despite her requests for light duty, limited duty and/or auxiliary assistance during each pregnancy, the Postal Service denied to Rural Carrier White "officially assigned duty requiring less exertion than [her] normal duties." 3 J.A. at 392, 442, 470-75. Postmaster Saylor denied her requests on the grounds that Article 13 of the Agreement prohibited the Postal Service from assigning "light duty" to rural carriers. 2 J.A. 325.

i. *The 1985 Pregnancy.* Rural Carrier White initially requested a light duty assignment from Supervisor Stallings and submitted a doctor's letter which requested a limited work week; in April and July she submitted doctor's notes that requested placement on "limited duty' or "light duty" due to her pregnancy. 3 J.A. at 308-09, 391-92, 394-404. After consulting with Mr. Saylor, Mr. Stallings advised Ms. White that she was not entitled to a light duty assignment "due to her status as a Rural Carrier." 1 J.A. 72.

Between April and July 1985, Supervisor Stallings commented about the fact that Rural Carrier White was working and even yelled that "if you cared about your child, you wouldn't be working!" 3 J.A. at 416-23. Supervisor Stallings would also hold back the mail when she was on leave to make her work day longer on her return, and repeatedly requested additional doctor's statements. *Id.*

On July 1, 1985, Rural Carrier White gave Stallings a leave slip so that she could obtain medical documentation he requested. Stallings suspended her, and required submission of a doctor's statement in the morning. On July 2, Ms. White returned without a doctor's statement because her doctor's position was the same; she requested to see a postal doctor. Supervisor Stallings suspended her and threatened to call the police if she did not leave. Because of these actions, Rural Carrier White left the building. 3

J.A. at 311, 423-24, 426-27. She was later placed on an "emergency" "off-duty status" because she had not provided medical documentation that her assigned duties could be performed in a safe manner. 2-3 J.A. at 312, 424, 428.

On July 5 and 19, Rural Carrier White presented medical certifications of her ability to perform her job duties with requests for a limited work week and a limited or light duty placement. 2-3 J.A. at 331-14, 429-31, 433. Nevertheless, by letter dated July 19, Supervisor Stallings issued a 14 day suspension for failing to furnish the required medical documentation and formally placed her in an off duty status despite his failure to provide her with the proper medical forms. J.A. at 315, 436, 570-71, 577.

Postmaster Saylor testified without contradiction that there was no justification for Supervisor Stalling's actions of removing and suspending Rural Carrier White. 3 J.A. at 676-77.

ii. *The 1986 Pregnancy.* Rural Carrier White again requested light or limited duty assignments due to her pregnancy. 3 J.A. at 442. However, on November 29th she was placed on off duty status by a postal safety manager, and a postal physician. 3 J.A. 460-63. The postal physician had declared her unfit for duty by telephone without a physical examination.

Eleven days later when the same postal doctor examined Ms. White, the doctor found her fit for light duty but not regular duty. Although Rural Carrier White's ability to work with assistance was corroborated by a December 12th Postal Medical Form completed by her personal physician, she was never granted a light duty or limited duty assignment. 2-3 J.A. at 320-22, 457, 460-66. Rural Carrier White would have worked as close as possible to her child's birth had she been given such an opportunity. 3 J.A. at 469.

iii. *The 1988 Pregnancy.* During her third pregnancy she again requested and was denied light duty or auxiliary assistance. 2-3 J.A. at 470, 473-74, 477-79, 323-25.

On August 23, after the Station Master denied her request, she asked Postmaster Saylor for the reason in writing. 2 J.A. 324. His response was that Article 13, Sec. 3, prevented such an assignment. 2 J.A. 325.

On August 24th a postal doctor found her fit for duty with restrictions. Two days after the doctor's determination of fitness, Rural Carrier White was informed that the same postal doctor had found her to be unfit. She was placed on off duty status and was unable to work thereafter. 3 J.A. 481-86. Rural Carrier White's personal doctor never stated she should stop working and, if permitted, she would have worked up to the birth of her child if possible. 3 J.A. at 486, 489.

There is no evidence that any other rural carrier had similar medical documentation or examination requirements imposed or had their leave requests denied when they suffered from a temporary or long term disability that occurred either on or off-the-job.

d. *Evidence of Lighter Duty Assignments to Rural Letter Carriers*. Postmaster Saylor testified that both city and rural carriers who suffered from on the job related temporary disabilities at the Annapolis Post Office were regularly provided lighter duty temporary assignments ("limited duty") as clerks. 3 J.A. 679. He explained that it was the policy and practice of the Postal Service to provide the lighter work to such employees to reduce the costs of workers compensation payments. J.A. 298;

The Steward of the American Postal Workers Union who had been a pool clerk since 1987 at the Annapolis office testified that rural carriers and other carriers performed as clerks when they performed light or limited duty and that rural carriers in that office had been assigned light duty. 3 J.A. 591-93, 597-601, and 598. The union would and did not object to the assignment of rural carriers to light duty, unless the part-time flexible employees were not getting their minimum hours. 3 J.A. 599.

Rural Carrier Gus Franz was employed by the Annapolis Post Office during 1985 and 1986, the period in which Rural Carrier White was being denied lighter duty assignments and work. 3 J.A. at 516-17. Franz suffered a heart attack while he was off-the-job and later had a heart bypass operation. Supervisor Stallings was Franz's supervisor and granted him assistance for about four to five months; he received significant assistance during the period in which Rural Carrier White had requested assistance and while she was on maternity leave. 3 J.A. at 521-22, 526-27, 603, 686.

The Postal Service offered no testimony to deny that after his bypass operation Rural Carrier Franz was in fact allowed to perform lighter than full duty work. The Postal Service, through different members of management, offered three different explanations for granting Rural Carrier Franz assistance. It was stated that Rural Carrier Franz received assistance after his heart attack because: 1) he was older than plaintiff; 2) such lighter duty was recommended by the Baltimore Rural Section; or 3) such lighter duty would prevent Franz from exceeding the maximum allowable hours. 1, 3 J.A. at 133, 312, 530-31.

David Cohen, who was a substitute rural carrier from 1985 to 1988, testified that he substituted for two to three week intervals for Rural Carrier Franz in 1985. Rural Carrier Franz would arrive at work at 6:00 a.m. and leave for the day at 8:00 a.m. (after Mr. Cohen arrived to take over his route); Mr. Cohen, testified that this type of substitution was not normal at the time he did it and "even in the future it had never been done either before or after." 3 J.A. at 628, 633-38, 650.

Another Annapolis postal employee testified that after his operation Rural Carrier Franz "just cased the mail and stayed in the office all day, didn't go out on his route" and "normally he would put up his mail and leave." 3 J.A. at 615-16.

On July 8, 1988 Rural Carrier David Cohen (who had become a regular rural letter carrier) had a vasectomy operation; he requested and was paid at his regular rate of pay when he

received assistance with his route for a three day period. 3 J.A. at 628, 642-45, 549, 604, 229.

e. *Clerical Work Rural Carrier White Could Have Performed.* Postmaster Saylor testified there was no other work available that Rural Carrier White was qualified to perform. 1 J.A. at 142-44. He conceded that lighter duty work was regularly provided to Rural Carriers and city carriers, if they suffered from job related injuries. 3 J.A. 679; *see* 279.

There was, in addition, testimony that rural carriers who were assigned to light or limited duty performed clerk work, that extra work was available during Ms. White's pregnancies, and that at least three rural carriers had worked as clerks instead of performing their regular duties from 1985 to 1988, while suffering from temporary disabilities not related to pregnancy. 3 J.A. at 545-49. An Annapolis supervisor testified that they could have found lighter work which Rural Carrier White was able to perform during 1988 even with the restrictions that had been placed on her lifting and carrying. 2 J.A. at 212, 222-25.

3. *Administrative and District Court Proceedings.*

a. Rural Carrier White's 1985 and 1986 formal complaints of discrimination were denied by a Hearing Examiner, adopted by the Postal Service, and upheld on appeal to the EEOC. 1 J.A. at 48-49, 63-64. Her 1989 complaint concerning denial of lighter work during her 1988 pregnancy resulted in a recommended finding by a Hearing Examiner that the Postal Service intentionally discriminated against her based upon her pregnancy by not granting her request for less than full duty assignments; however, the Postal Service in its final agency decision rejected those recommended findings. 1 J.A. at 49, 66-67, 40 n. 3.

b. Ms. White filed this action alleging employment discrimination on the basis of sex, race, and reprisal in violation of Title VII. 1 J.A. at 16. In its answer, the Postal Service admitted that it granted light and limited duty assignments to persons not of Ms. White's sex, but denied granting "light duty" assignments to

any Annapolis rural carriers. 1 J.A. at 28. Both parties motions for summary judgment were denied. 1 J.A. at 35, 37-38, 40-41.

In its proposed findings and conclusions, the Postal Service acknowledged that rural carriers were granted "limited duty" at the Annapolis Post Office for on-the-job injuries. J.A. at 80. The Postal Service however argued that Postmaster Saylor and Supervisor Muller correctly relied upon Article 13 of the collective bargaining Agreement which "strictly prohibited the grant of light duty assignments to Rural Carriers," in denying the requests of Ms. White for light duty. 1 J.A. at 72-73, 83-84. It also proposed findings that "plaintiff cannot identify any Rural Carrier to whom" the Postal Service at Annapolis "has granted a light duty assignment", and that the Postal Service at Annapolis never granted a light duty assignment to anyone, and that indeed Ms. White was the only rural carrier at the Annapolis Post Office who ever requested a "light duty assignment." J.A. at 75-76. The Postal Service argued that plaintiff "failed to present facts sufficient to establish a *prima facie* case of discrimination" because she failed to identify any rural carrier at Annapolis who was ever given "a light duty assignment and/or auxiliary assistance by Mr. Saylor or Mr. Muller." J.A. at 80-81, 86.

The Postal Service also argued that the plaintiff had failed to show that the Postal Service's interpretation of Article 13 of the Agreement was incorrect, and that in any event, even if the plaintiff had introduced evidence sufficient to constitute "a *prima facie* case of discrimination", plaintiff had "produced no evidence of pretext. Accordingly her claim must be denied." J.A. at 87.

The district court, Judge Norman P. Ramsey presiding, required a proffer regarding the assistance Rural Carrier Cohen received after his vasectomy because Cohen's circumstances were not comparable. 3 J.A. at 512. However, after the Postal Service objected to the similarity of Rural Carrier Franz, Judge Ramsey ruled that Franz would be treated differently than the other cases in which he saw no comparability, and that "useful" information would be that for some reason aid was given to Franz and "he was a rural mail carrier at the time and he was a male, and presumably

a white male." 3 J.A. 523-25. Judge Ramsey ultimately overruled the Postal Service's objection. 3 J.A. at 532, 523-25, 581-82.

4. *District Court Decision.*

The district court found that "plaintiff has demonstrated that in each instance, as a result of physical limitations occasioned by her pregnancies, she was unable to perform the full burden of her duties as a rural carrier" and that the Postal Service's interpretation of the Agreement "necessarily resulted in an adverse impact on the plaintiff." App. 13a, 15a. The court ruled that plaintiff had established facts which demonstrated that defendant's actions "were more likely than not due to intentional consideration of a statutorily impermissible factor such as sex, the plaintiff has proven a *prima facie* case of employment discrimination" by showing that (1) she is a member of the protected class; (2) that she qualified for light duty and applied for the type of duty in 1985, 1986 and 1988; (3) that her requests were denied. App. 14a-15a.

The district court did not make a finding regarding the "similarity" of Rural Carrier Franz to Rural Carrier White. *See* 3 J.A. at 500, 514-32, 579-83, 587, 604, 609, 615-66, 686-86 (record references to Franz). Instead, the court cited and quoted the definition of sex set forth in Sec. 701(k), and ruled: "[i]t is not necessary for the plaintiff to identify a specific *person* who received more favorable treatment under such circumstances." App. 15a (emphasis in original). The court then ruled that plaintiff met the fourth prong of the *McDonnell Douglas* analysis by demonstrating that the "the Agreement which was used to deny her light duty clearly permits light duty to other similar situated rural carriers." App. 15a. The district court concluded that the Postal Service "misread", "misinterpreted" and "employed the terms of the Agreement to discriminate against" Ms. White "on the basis of her sex and her pregnancies." App. 13a.

"Where the light duty requests were occasioned by pregnancy, the defendant's use of the Agreement to deny light duty assignments to plaintiff is discriminatory", the court ruled, and added that the Postal Service afforded rural carriers "as a group"

the "privilege of light duty assignments under circumstances similar to those in which it denied the privilege to plaintiff. The conclusion is inescapable that the Postal Service discriminated against the plaintiff on the basis of her sex." App. 15a.

The district court granted Ms. White reimbursement for all annual leave, sick leave and maternity leave she used because of the Postal Service's discriminatory denial of light duty, together with backpay, litigation costs and attorney fees", and a correction of her service record. App. 15a-16a.

5. *Court of Appeals Decision.* In its October 18, 1993 decision, the Court of Appeals, agreed that the Postal Service's reliance upon the Agreement to justify the denial of lighter work to Ms. White was erroneous, but concluded that Postmaster Saylor's allusion to a "possible situation" in which a rural carrier could receive light duty had been used as "evidence" that rural carriers are afforded light duty under similar circumstances. App. 7a-8a.

Citing *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed 2d 407 (1993) as support, the Fourth Circuit concluded that White did not show "causation of the wrong and the right to the remedy" and that the misinterpretation of the agreement did not constitute a violation of Title VII. App. 8a. The Fourth Circuit held that the "critical and unrefuted" record evidence was that no "rural carrier anywhere, let alone at the Annapolis Post Office, actually received a light duty assignment." App. 8a. The Fourth Circuit therefore reversed because there was "no evidence to support a finding that either Saylor or Muller intentionally discriminated against White because of her sex", and that the "district court's leap from the USPS' erroneous interpretation of the contract to the conclusion that 'rural carriers as a whole are granted light duty' under similar circumstances proceeds from speculation rather than from a legally justifiable inference from the evidence." App. 9a.

The Petitioner-Appellee White had argued that the Postal Service's interpretation of the Agreement was itself discriminatory, because the practice of granting rural carriers lighter assignments because of work related disabilities but denying them for pregnancy related disabilities itself was disparate treatment in violation of the Pregnancy Discrimination Act provisions of Title VII. The Court stated that it would not address the argument because the argument was "raised anew on appeal", and therefore could not be used to defend the district court's judgment because it was not argued to the district court." App. at 9a n.5.

The Court had nevertheless accepted as the controlling standard whether the plaintiff had shown that a rural carrier had been granted "light duty" at the Annapolis Post Office. App. 9a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit in this case has held that unless a plaintiff shows not only *prima facie* evidence of discrimination sufficient to persuade the finder of fact that the employer's proffered reason is a "pretext", but also additional evidence proving that the proffered reason is false, the finder of fact may not infer discriminatory motive under Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act. In so doing, the Fourth Circuit continued its conflict with the holdings of at least nine other circuits, notwithstanding the clarification by this Court of the law last Term in *St. Mary's Honor Ctr. v. Hicks*, *supra*. Review by this Court is warranted to resolve the continuing conflict.

The Fourth Circuit also sustained the lawfulness of the Postal Service's practice of granting lighter duty assignments to non-pregnant employees who are injured on-the-job, while denying lighter duty work to pregnant employees whose disability arises from pregnancy, but who are similar in their ability or inability to work. Yet that practice of the Postal Service of violates the plain language of Title VII as amended by the Pregnancy Discrimination Act. *International Union, UAW v. Johnson Controls*, 111 S.Ct. 1196 (1991). In light of the size of the Postal Service and its

status as an agency of the United States that issue is one of public importance which warrants review by this Court.

I. The Fourth Circuit decision is in conflict with the language and purpose of the Pregnancy Discrimination Act provisions of Title VII, which require that employers treat pregnant workers "the same for all employment-related purposes" as non-pregnant workers who are "similar in their ability or inability to work." Sec. 701(k), 42 U.S.C. 2000e(k), quoted above, p. 2. Discrimination because of pregnancy is the same as discrimination because of sex. *Id.*

Even if it were true that the Postal Service officials believed that the collective bargaining Agreement here precluded them from granting pregnant rural carriers lighter duty, the uncontradicted evidence of record showed that the Postal Service had granted both rural and city carriers who suffered job-related disabilities such lighter duty, but denied such an assignment to the plaintiff, because her pregnancy was not "job related." The plain language of the Act requires the employer to treat workers disabled by pregnancy "the same" as it treats other workers who are temporarily disabled, but "similar in their ability or inability to work." In this case, it was conceded that plaintiff White was as able to perform the duties of a clerk, notwithstanding her pregnancy, as were the carriers who were assigned to perform lighter work. By denying her lighter duty the postal Service did not treat her the same as non-pregnant workers with temporary disabilities who were "similar in their ability or inability to work."

Under the terminology of the Postal Service and the collective bargaining agreement, "light duty" and "limited duty" are both "officially assigned duty requiring less exertion than the employees normal duty", but "limited duty" is restricted to disabilities arising from events occurring on the job, and "light duty" is for other disabilities. Under the Postal Service's practice, pregnancy related conditions are classified as other than on-the-job injuries. If we accept the reasoning of the Fourth Circuit, the Postal Service granted light duty to workers who were temporarily disabled because of on-the-job injuries, but denied such duty to

plaintiff whose temporary disability arose from her pregnancy. Yet the non-pregnant workers were no better able to perform the lighter duties than are the pregnant workers. Accordingly, the practice of the Postal Service violates the language and purpose of the Act by discriminating against workers because their pregnancy. *See Johnson Controls*, 111 S.Ct. at 1203 ("policy is not neutral because it does not apply to ... male employees in the same way it applies to that of the females", here "pregnant" employees); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1511-12 (9th Cir. 1989). The Postal Services's interpretation of the National Agreement was itself a violation of the Act, unless the employer has shown a bona fide occupational qualification which it has not done and cannot do, because both light duty and limited duty pertain to the same kind of lighter duty assignment. *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987).

The holding of the Fourth Circuit is also in conflict to the decisions of other circuits for it allows employers to "consistently employ discriminatory criteria as long as they [are] careful to draw their discriminatory lines broadly enough to include members of a non-protected class." *E.E.O.C. v. Board of Governors of State Colleges*, 957 F.2d 424, 431 (7th Cir. 1992). *Accord: NAACP v. Harrison*, 940 F.2d 742 (3d Cir. 1991); *United States v. Town of Cicero*, 486 F.2d 311 (7th Cir. 1986).

As interpreted by Postal Service, the Agreement will always classify pregnancy related conditions as "light duty" or "off-the-job injuries." The Agreement imposes a clear obligation on both parties to ensure that employees injured on the job are returned to lighter duty work, but imposes no such obligation upon employees temporarily disabled by pregnancy. Accordingly, the Agreement will tend to exclude females who have pregnancy related disabilities from obtaining work and pay in less than regular assignments or modified tasks because these temporary disabilities are pregnancy related, and thus will violate Title VII as amended. See cases cited above.

The legislative history of the Pregnancy Discrimination Act demonstrates that the Act requires pregnant women to receive the same treatment as non-pregnant workers who are similar in their ability or inability to work. And it specifically states that "[t]he 'same treatment' may include employer practices of transferring workers to lighter assignments . . . ." *See* H.R. Rep. No. 95-948, Legislative History PL 95-555, Civil Rights Act of 1964, Pregnancy Discrimination, 95th Cong. 2d Sess. *reprinted in*, 1978 U.S. Code Cong. & Ad. News 4749, 4752-53. *Accord*: S. Rep. 95-331 at 3-4, *reprinted in* Legislative History at 40-41 ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and ...they must be accorded the same rights, leave privileges and other benefits as other workers. . . .).

The Postal Service offered its interpretation of the Agreement as evidence that it did not deny lighter assignments to Rural Carrier White because of her pregnancy but for the alleged reason that all rural carriers who suffer off-the-job injuries were denied light duty assignments. This evidence did not constitute a nondiscriminatory explanation for its conduct, but was itself an explanation that showed that the Postal Service discriminates against pregnant workers, and therefore is unlawful. For, "[t]reating women differently 'on the basis of pregnancy' constitutes discrimination 'on the basis of sex' because Congress has unequivocally said so." *International Union, UAW v. Johnson Controls*, 111 S.Ct. at 1216 (Justice Scalia's concurring opinion); 42 U.S.C. 2000e(k).

The fact that the Postal Service's interpretation of the Agreement would theoretically have prevented such assignments to non-pregnant rural letter carriers who sustain off-the-job injuries does not require a different result. In the first place, the record here is unequivocal that White was the only rural carrier at Annapolis who requested and was denied "light duty", because she was the only rural carrier who ever asked for it. See above, p. 10. In any event a discriminatory policy or practice cannot be rendered nondiscriminatory merely because some unprotected employees (here non-pregnant rural letter carriers disabled off the job for

reasons other than pregnancy) are included in the group of employees excluded from favorable treatment (pregnant rural letter carriers). *See E.E.O.C. v. Board of Governors of State Colleges*, 957 F.2d 424 (7th Cir. 1992)

The Fourth Circuit stated that it declined to address this issue because it was not argued to the district court. App. 9a n. 5. However, this ground was raised by Petitioner-Appellee to sustain the district court's judgment and is a basis for this Court to reverse and remand this case to the Fourth Circuit. For it "is settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record . . . ." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *United States v. American Ry. Express Co.*, 265 U.S. 425, 434 (1924). *Accord Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979).

Moreover, by holding that the trial court decision should be reversed because "there was no evidence that any rural carrier anywhere, let alone at the Annapolis Post Office, actually received a light duty" assignment, and that "neither Saylor nor Muller has *ever* granted light duty to a rural carrier" (App. 9a), the Court of Appeals accepted as lawful the Postal Service's practice of denying lighter duty work to a pregnant worker, even though it had concededly granted lighter clerical duty (that is "limited duty") to non-pregnant employees in Annapolis and elsewhere who were disabled by job related injuries, but who were similar in their ability to work as Ms. White. Thus the decision of the Fourth Circuit turned on the Fourth Circuit's assumptions of lawfulness of the practice of the Postal Service of granting lighter work to non-pregnant workers while denying such work to Ms. White whose disability was due to her pregnancy.

While the interpretation at issue here was apparently limited to the Annapolis Post Office, the Agreement itself requires the Postal Service to grant assistance to rural carriers injured on-the-job while it does not require similar assistance to rural carriers who are injured off-the-job. The interpretation of the Agreement at issue here warrants review because the Agreement governs all of the rural carriers employed by the Postal Service which is one

of the largest agencies in the United States. It therefore is an issue of public importance.

II. While recognizing that the critical inquiry in a discrimination case that has been tried on the merits is the question of discrimination *vel non*, the Fourth Circuit held that the plaintiff's evidence did not permit the finder of fact to infer discrimination from his disbelief of the reason given by the employer, plus evidence sufficient to show a *prima facie* case under the *McDonnell Douglas* analysis.[2] App. 6a, 8a. The evidence that there was no evidence of a comparably situated rural carrier who received a "light duty" assignment was perceived as "critical and unrefuted" and formed the basis for the court of appeals to overturn the district court's finding of discriminatory intent.[3]

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[2] *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 800-02 (1973).

[3] By using the term "light duty" the Fourth Circuit restricted the persons whom it considered comparable to rural carriers whose disabilities did not arise from job related events. Yet, because no one other than Rural Carrier White had formally asked for "light duty," according to the theory of the Postal Service which the Court accepted, no one individual could have been considered comparable. The Fourth Circuit's analysis also relies upon terminology rather than reality, because the critical question is whether the Postal Service authorized persons with temporary disabilities to perform and receive pay for lighter duty work, no matter what it was called.

As pointed out in our Statement, in fact Rural Carrier Franz worked for several months as a clerk while he recovered from his heart bypass surgery, as the Postal Service conceded.

While the district court correctly believed that specifying an individual comparable person was unnecessary, surely the courts should look at the "actual effects" of the employees ability or inability to work, rather than upon the artificial terminology of the employer to measure comparability.

This decision continues a line of decisions of the First Circuit and the Fourth Circuit interpreting the *McDonnell Douglas* analysis as requiring not only evidence sufficient to constitute a *prima facie* case before the finder of fact can find purposeful discrimination, but also requiring additional evidence that the employer's proffered reason is false and discriminatory. This interpretation may fairly be called a "*prima facie* plus" interpretation of the *McDonnell Douglas* analysis. *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d 43, 48 (1st Cir. 1990); *Wileman v. Frank, 979 F.2d 30, 35 (4th Cir. 1992); Spencer v. General Elec. Co.*, 894 F.2d 651 (4th Cir. 1990). The Fourth Circuit appears to follow that rule, because it has ruled that to defeat a motion for summary judgment, the plaintiff must not only show a *prima facie case*, but must also show additional evidence that the decision was based upon impermissible considerations, such as age or sex. "If the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual *and* that the employment decision was based on a sexually-discriminatory criterion." *Spencer v. General Elec. Co.*, 894 F.2d at 659. In short, the Fourth Circuit has held that a plaintiff must produce *prima facie* plus additional evidence, in order to permit the finder of fact to infer discrimination.

Nine of the ten circuits who have addressed the issue, however, have held that the finder of fact may infer discriminatory motive from the evidence constituting the *prima facie* case and hearing and observing the testimony of the employer's witnesses, if the finder of fact concludes that "the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine* , 450 U.S. 248, 256 (1981). The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have held that "[a] showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated." *See Ramseur v. Chase Manhattan Bank* , 856 F.2d 460, 464-65 (2d Cir. 1989). See other holdings

of the Third, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuit, cited by the First Circuit in *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d at 48 (1st Cir. 1990).

This Court recently held that when the plaintiff has made a *prima facie* case, and has persuaded the finder of fact to disbelieve the reason offered by the employer, the finder of fact may, but need not, infer discrimination. *St. Mary's Honor Ctr. v. Hicks, supra*, 113 S.Ct. at 2749 ("The factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination. . . and the Court of Appeals was correct when it noted that '[n]o additional proof of discrimination is *required*,. . . '"). The Second Circuit has so recognized. *De Marco v. Holy Cross High School*, 4 F.3d 166, 170 (2d Cir. 1993). However, the Fourth Circuit's decision here indicates that it continues to follow the "*prima facie* plus" interpretation of the *McDonnell Douglas* analysis. And a careful reading of a recent decision of the First Circuit indicates that, notwithstanding the decision in *St. Mary's Honor Ctr. v. Hicks, supra*, the First Circuit also continues to follow the "*prima facie* plus" interpretation. *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 843-849 (1st Cir. 1993) (sustaining summary judgment for the defendant notwithstanding evidence assumed to be sufficient to constitute a *prima facie* under the Age Discrimination Act).

Here the district court followed precisely the law as set forth by this Court in the *St. Mary's Honor Ctr.* decision, and inferred discrimination based not only upon the evidence constituting a *prima facie* case, but also upon its disbelief of the Postal Service's proffered reasons, as set forth in the testimony of Supervisor Stallings and Postmaster Saylor. The decision of the Fourth Circuit in this case, while acknowledging some of this Court's language in *St. Mary's Honor Ctr*, ignores the thrust of its holding, that a *prima facie* case, coupled with the fact finder's disbelief of the proffered reason, is sufficient to sustain a judgment

for the plaintiff.

Accordingly, this Court should grant certiorari to resolve the continuing conflict in decisions between the Fourth Circuit, and the decisions of the nine other circuits that have ruled on this issue.[4]

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[4] We believe that under *St. Mary's Honor Ctr.*, the district court was free to consider, weigh, and judge the credibility of the evidence from Supervisor Stallings and Postmaster Saylor (which showed that Rural Carrier White received different treatment from other employees at the Annapolis Post Office who were similar in their ability or inability to work) as support for its ultimate finding of discrimination. The finding of purposeful discrimination here was supported by the uncontradicted testimony of Stallings' animus against having pregnant women continue to work, and upon the uncontradicted facts that White was the only worker who was denied light duty work, and that several rural carriers concededly were granted limited duty assignments, and rural carrier Franz was granted some form of lighter duty. Having found that discrimination was more likely the cause than not, the fact finder's decision should have been sustained under *St. Mary's Honor Ctr.*

If the Fourth Circuit believed that some more particularized finding was required the only ruling consistent with this Court's decision in *St. Mary's Honor Ctr.* was a remand to the district court for clarification of the district court's findings. *Amadeo v. Zant*, 486 U.S. 214 (1988).

CONCLUSION

For the reasons set forth above, this Court should grant the petition and review the decision below.

Respectfully submitted,

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February 14, 1994

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PATRICIA L. WHITE,

Plaintiff-Appellee,

v.

ANTHONY FRANK, Postmaster General,

Defendant-Appellant.

No. 92-1579

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Norman P. Ramsey, Senior District Judge.
(CA-90-1378-R)

Argued: March 3, 1993

Decided: October 18, 1993

Before MURNAGHAN and NIEMEYER, Circuit Judges, and RESTANI, Judge of the United States Court of International Trade, sitting by designation

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Reversed by unpublished per curiam opinion.

COUNSEL

ARGUED: Kevin Barclay Rachel, Office of Labor Law, UNITED STATES POSTAL SERVICE, Washington, D.C., for Appellant. Squire Padgett, Washington, D.C., for Appellee. **ON BRIEF:** Jesse L. Butler, Assistant General Counsel, Office of Labor Law, UNITED STATES POSTAL SERVICE, Washington, D.C.; Richard D. Bennett, United States Attorney, Donna C. Sanger, Assistant United States Attorney, Baltimore, Maryland, for Appellant. David L. Rose, Debra Palmer Henry, Washington, D.C.; Isaac Joe, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Plaintiff-appellee Patricia L. White filed suit against the United States Postal Service ("USPS") alleging race and sex discrimination. White claimed that during each of her three pregnancies, the USPS unlawfully discriminated against her by denying her requests for light duty. The district court found no evidence of race discrimination but concluded that the USPS had discriminated against White on the basis of her sex in violation of Title VII of the Civil Rights act of 1964, 42 U.S.C. §2000e-16(a). The USPS, as defendant, filed the instant appeal and has contended that the district court's finding of sex discrimination was clearly erroneous because it was based on the use of an erroneous legal standard and was against the weight of the evidence.

Within the USPS, there are several "crafts," including, *inter alia*, a clerk craft, a city carrier craft, and a rural carrier craft. Each craft is represented by its own national union. The USPS and the National Rural Letter Carriers' Association had, at all times relevant to the instant case, a collective bargaining agreement which established wages, hours, working conditions, grievance procedures, etc. Article 13 of the agreement governed the assignment of ill or injured employees. Sections 1 and 2 of Article 13 related to the provision of "limited duty." "Limited duty" is provided to employees who are unable fully to perform their regular duties as a result of *on-the-job injuries*.[1] By contrast, "light duty" is

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1. Section 1 of the agreement states:

Assistance for Employees

The Employer will make an effort to assist employees who through occupational injury or occupational illness are unable to perform their regularly assigned duties. This effort will consist of possible assignment to limited duty work if such is available.

Section 2 states:

Federal Employees' Compensation Act

It is understood that the provisions of this Agreement are subject to the obligations and responsibilities imposed by the Federal

defined by the USPS as a duty requiring less exertion than regular duties that is given to employees who are unable to perform fully their regular duties as a result of *illnesses or injuries sustained off the job.* Section 3 of Article 13 referenced "light duty" and stated:

> No Light Duty Assignments
>
> In the rural carrier craft, at any local installation, regular rural routes shall not be considered for any light duty assignment.

In asserting its defense during the proceedings below, the USPS relied on those provisions and, in particular, on the agreement's distinction between "limited duty" and "light duty."

Appellee White worked as a rural letter carrier at the Annapolis, Maryland, United States Post Office on Legion Avenue. In 1985, 1986, and 1988, White became pregnant. During each pregnancy she experienced difficulties performing all of her duties and, as a result, she requested light duty. In 1985, during her first pregnancy, White sought out her immediate supervisor, George Stallings, and requested light duty. Stallings and later the Postmaster of the Annapolis Post Office, Charles Saylor, informed White that there was no light duty in the rural craft.[2] In addition, White received a letter from Saylor, dated April 24, 1985, in which he officially denied her request for light duty. The letter stated: "In regard to our conversation of April 23, I do not have a suitable light duty assignment for you. While I agree with Gary [the union shop steward] that a rural carrier could be placed in a light duty position, such a position is not available at this office."

Employees' Compensation Act and its implementing regulations. Recognizing the mutual obligation to be fully responsive to insure that employees with job-related illnesses or injuries are returned to duty subject to their medical restrictions.

2. According to the testimony, only the Postmaster, or the temporary officer in charge, has the authority to grant light duty requests.

In 1986, White verbally requested a light duty assignment as a result of her second pregnancy. At the time of the request, Richard Muller was the temporary officer in charge at the Annapolis post office. Muller testified that in denying the request he referred to Article 13, Section 3 of the rural craft's collective bargaining agreement as prohibiting light duty for the rural carrier craft. There is, as the district court noted, no written record of the second denial.

Finally, in 1988, White again requested light duty as a result of her third pregnancy. The station manager at the time, Judy George-Thompson, initially denied the request. Several days later, Postmaster Saylor, citing Article 13, Section 3 of the rural craft's bargaining agreement, formally denied the request.

After pursuing her administrative remedies, White filed suit in federal court alleging sex and race discrimination. Both parties moved for summary judgment. The USPS contended that two of White's claims were untimely, while White argued that there was no genuine issue as to any material fact. The district court denied both motions. The case was tried before the district court on July 22 and 23, 1991. At the bench trial, both Saylor and Muller testified that they had never granted light duty to a "rural carrier," nor had they ever, to the best of their knowledge, received a light duty request from a rural letter carrier.

The district court found no evidence of race discrimination. The court concluded, however, that White had been the victim of sex discrimination. "The record is replete," it noted, "with evidence that each controversy arose out of one of the plaintiff's pregnancies and the interpretation of the Agreement by defendant's management representatives." The court then determined that, "as a matter of law," the USPS had "misread and misinterpreted" the provisions of the collective bargaining agreement to "discriminate against the plaintiff on the basis of her sex and her pregnancies." The court found that the USPS did not consistently apply the collective bargaining agreement to bar light duty to rural carriers on the grounds that the USPS

had "concede[d] that there are circumstances where Rural Carriers could be granted a light duty assignment." Therefore, the court's reasoning ran, the USPS' explanation that the Agreement did not permit light duty assignment to White at the Annapolis office was merely an "arbitrary" and "artificial distinction."

Further, the court concluded that White was not required to identify a specific similarly situated person outside of her protected group who had received light duty (the fourth prong of the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-02 (1973)), because the USPS' "own testimony and documents" made it "clear" that "as a group rural carriers are afforded the privilege of light duty assignments under circumstances similar to those in which it denied the privilege to the plaintiff." The court therefore found in favor of White on her sex discrimination claim.

The sole issue on appeal is whether the district clearly erred in finding that the USPS discriminated against White on the basis of her sex. The district court's decision should be reversed only if it is shown that, without regard to what the "actual" facts may be, "'the findings under review were induced by an erroneous view of the controlling legal standard; or are not supported by substantial evidence; or were made without properly taking into account substantial evidence to the contrary; or are against the clear weight of the evidence considered as a whole.'" *Moore v. City of Charlotte*, 754 F.2d 1100, 1104 (4th Cir.) (quoting *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 (4th Cir. 1983), *cert. denied*, 470 U.S. 1083 (1985)), *cert. denied*, 472 U.S. 1021 (1985)); *see also Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

The USPS has asserted that the district court's finding of sex discrimination in the instant case is clearly erroneous because the court was induced by an erroneous view of the controlling legal standard and reached its conclusion against the weight of the evidence as a whole. More specifically, the USPS has contended that the district court committed its first error when it excused White from having to identify any similarly situated

individual who had received more favorable treatment. Furthermore, according to the USPS, even if the court did not err by excusing White from identifying similarly situated individuals, the court's finding that the USPS had a practice of permitting rural carriers light duty in comparable situations and that therefore it discriminated against White is not based on a plausible reading of the record.

It is true that White failed to identify any similarly situated employees. Although she attempted to present several employees who had been given light duty, White's proffers repeatedly were rejected by the court. *See, e.g., Moore,* 754 F.2d at 1105-06 (concluding that no similarly situated employees had been identified and finding no evidence to support a conclusion of an intent to discriminate). Nevertheless, we cannot overlook the fact that, as the plaintiff, White retained the ultimate burden of *persuasion* that the defendant intentionally discriminated against her on the basis of her sex. *See, e.g., Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). The critical and ultimate inquiry in a discrimination case that, like the instant one, has been tried on the merits is the question of discrimination *vel non. United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714 (1983) (The "factual inquiry" in a Title VII case is whether there was intentional discrimination.). As the Supreme Court commented in *Aikens,*

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

Id. at 715 (quoting *Burdine,* 450 U.S. at 253).

Having reviewed the record in detail and also keeping in mind the burden on the plaintiff ultimately to prove discriminatory intent by a preponderance of the evidence, we have come to the conclusion that the district court clearly erred in ruling that the USPS discriminated against White on the basis of her sex. We begin by agreeing with the district court that Postmaster Saylor and Temporary Officer in Charge Muller misread and misapplied the rural craft's bargaining agreement. The language of Article 13, Section 3 of the agreement does not on its face exclude rural *carriers* from receiving light duty assignments. Rather, the phrase refers to "regular rural *routes*." "Regular rural routes," the agreement states, "shall not be considered for any light duty assignments." Performance of rural route duties, not one's classification, is what is referred to. Light duty in some craft other than "rural routes" was not prohibited.

Saylor and Muller, however, testified that they denied White's light duty requests because they read Article 13, Section 3 as prohibiting "light duty in the rural craft." Postmaster Saylor continued that he "could conceive" of some circumstances where a postmaster at some location could grant light duty to a rural carrier:

> Well, in a small office where there's the postmaster and a rural carrier and a clerk [from the clerk craft], if the rural carrier became disabled because of an injury at home and the clerk was, say out sick or on vacation, then it would be obvious, the postmaster couldn't deliver the rural route and be a window clerk, so it's conceivable that the postmaster could call up the rural carrier and say what can you do? Can you case your mail. Can you service the counter? And try to work around the problem as best he can in that particular circumstance.

Saylor's testimony formed the basis for the USPS' assertion in its proposed findings of fact that there are circumstances at post offices other than the Annapolis Post Office under which a rural carrier *could* be granted a light duty assignment.

The district court used Saylor's allusion to a possible situation in which a rural carrier (possibly male or female) could receive light duty as *evidence* that "as a group rural carriers are afforded the privilege of light duty assignments under circumstances similar to those in which" it was denied to White. From there the court inferred that the USPS' explanation for denying White light duty was arbitrary, and it concluded that the USPS had intentionally discriminated against White on the basis of her sex.

Although we are reluctant to reverse a district court's finding of intent, we conclude that the court's ultimate determination in the instant case simply is not supported by the record as a whole. The interpretation of the contract was erroneous and resulted in undue hardship for White.[3] However, causation of the wrong and the right to the remedy had to be shown by White. Without more, the misinterpretation of the agreement does not, on the facts of the instant case, constitute a violation of Title VII. We have stated before that Title VII is not a "bad acts" statute:

> [A] finding that the reasons proffered by the defendants were, in some general sense "unworthy of credence" does not of itself entitle plaintiff to prevail. The reason for *their lack of credence must be the underlying presence of proscribed discrimination.* We have no authority simply to require employers to use the "best" standards and procedures available to them.

Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir. 1989) (citation omitted); *see also St. Mary's Honor Ctr. v. Hicks*, ____ U.S. ____, 125 L. Ed. 2d 407 (1993) (stating that the trier of fact's rejection of the employer's asserted reasons for its actions does not mandate a finding for the plaintiff and holding that there still must be a finding of discrimination—which may be based, using the proper procedures, on disbelief of the defendant's reasons "together with the elements of the *prima facie* case.").

3. It may well have been prompted by unjustified considerations.

In the instant case, causation had not been proven. There is no evidence in the record that any rural carrier anywhere, let alone at the Annapolis Post Office, actually received a light duty assignment. As noted, all of the employees offered by White as similarly situated were discounted by the district court.[4] The critical and unrefuted evidence in the record is that neither Saylor nor Muller has *ever* granted light duty to a rural carrier. Given the number of workers and crafts present at the Annapolis Post Office, Saylor testified that he could not conceive of anyone in the rural craft receiving light duty in the Annapolis Post Office. In short, there is no evidence to support a finding that either Saylor or Muller intentionally discriminated against White on the basis of her sex.

Without more evidence from the plaintiff, the district court's leap from the USPS' erroneous interpretation of the contract to the conclusion that "rural carriers as a whole are granted light duty" under similar circumstances proceeds from speculation rather than from a legally justifiable inference from the evidence. Although the record displays conduct hardly commendable, a wrong reason for a justified conclusion, it does not support a finding of intent to discriminate.[5]

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4. On appeal White does not appear to rest on the district court's final analysis of the case as expressed in its Memorandum Opinion. Instead, she continues to rely on facts not cited by the district court as relevant, and she continues to refer to various employees as "similarly situated." The district court, however, found that those employees were not similarly situated, and its findings are not clearly erroneous. Its reasons for rejecting White's proffers included, *inter alia*, the fact that some of the employees had been injured on the job and thus were receiving limited duty and the fact that still others were receiving a different form of assistance, such as auxiliary assistance for an "overburdened rout," as defined in Article 9.2 of the rural craft's agreement.

The USPS readily admits that it provides limited duty assignments in *all* crafts to employees of *all* crafts. As it has emphasized, it is required to do so by law.

5. White also has raised anew on appeal the contention that the USPS' interpretation of the bargaining agreement as prohibiting light duty in the rural craft was itself violative of the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k). We initially are not persuaded by the arguments

In light of the record and our conclusions, the judgment is

REVERSED.

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presented, and we decline to address the issue because it was not argued to the district court. *See National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 318 (4th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PATRICIA L. WHITE *Plaintiff* v. ANTHONY M. FRANK, Postmaster General *Defendant*	CIVIL ACTION NO. R-90-1378

OPINION

The plaintiff filed suit against the Postmaster General asserting violation of Title VII of the Civil Rights Act of 1964. The cause of action was said to arise out of discrimination against her based on her race (black), her sex (female) and handicap (pregnancy).

The complaint alleged that the plaintiff had been discriminated against during each of her three pregnancies which occurred in 1985, 1986 and 1988. She complained that the defendant discriminated against her by refusing to allow her to remain on duty, but on "light duty" status, during the periods of her pregnancies when she was physically unable to perform all aspects of her job as a Rural Mail Carrier.

The matter was tried on July 22 and 23, 1991. The record has been transcribed and presented to the Court. The parties have submitted proposed findings of fact and conclusions of law, and counsel have been heard.

The Court makes the following findings of fact and conclusions of law upon a review of the entire record, all exhibits, and proposed findings and the arguments of counsel.

The plaintiff, Patricia L. White, ("Ms. White") was at all times relevant to this matter employed as a rural letter carrier at the U.S. Postal Office in Annapolis, Maryland. She was a member of a distinct craft identified as "Rural Carrier Craft" which had its own National Agreement (the "Agreement")

concerning conditions of employment. The Agreement governed the terms and conditions between the plaintiff and the Postal Service at all relevant times.

The Agreement makes a clear distinction between "light" duty and "limited" duty in the Rural Carriers Craft. Light duty is defined as those duties assigned to a postal employee to accommodate restrictions resulting from *non-work related* accidents. Limited duties are those duties assigned to a postal employee to accommodate restrictions resulting from a *work-related* accident.

Article 13 §3 of the National Agreement provides in pertinent part:

> **"Section 3. No Light Duty Assignments**
>
> In the rural carrier craft, at any local installation, regular rural routes shall not be considered for any light duty assignments."

When the first controversy arose in 1985, the plaintiff spoke with her intermediate superior about complications arising from her pregnancy. After consultation with the Postmaster at the Annapolis, Maryland postal facility, the plaintiff was advised that she was not entitled to a light duty assignment due to her status as a Rural Carrier. She was told, however, that liberal allowance would be made for personal and medical leave as needed. By letter of April 24, 1985, the Postmaster formally denied her request for assignment to light duty. The letter contained the following language: "In regard to our conversation of April 23, I do not have a suitable light duty assignment for you. While I agree with Gary [the union shop steward] that a rural carrier could be placed in a light duty position, such a position is not available to this office."

Further disagreements between the employee and the Postal Service followed the express rejection of her request by the April 24 memorandum, but it is not disputed that defendant did not provide a light duty assignment to the plaintiff. The continuing disagreements resulted in a personnel action on

July 2, 1985. The record indicates that the parties debated about the nature of the action and whether a suspension had in fact occurred. For present purposes, it is sufficient to note that Ms. White did not return to employment until after the birth of her first child on August 19, 1985.

Ms. White testified that in July of 1986, she again made a verbal request for light duty assignment as a result of her second pregnancy. In addition to the fact that there is no written record of this episode, the circumstances surrounding this pregnancy are confused by an accident on November 25, 1986, in which the plaintiff, while operating her postal delivery vehicle, struck a curb. As a result, Ms. White requested that she be afforded a *limited duty* assignment. This request was denied on November 26, 1986. On December 23, 1986, the medical officer for the Postal Service found Ms. White fit for light duty with certain restrictions including lifting and work hours. The record is not fully developed concerning the actions of the plaintiff and the Postal Service prior to the birth of plaintiff's second child on January 7, 1987.

The issue again arose on July 26, 1988, when Ms. White requested light duty from the Postal Service as a result of her third pregnancy. The exchange of memoranda continued through August of 1988 and finally resulted in a letter from the Postmaster to Ms. White on August 23, 1988, in which he expressly denied her light duty on the basis of Article 13 §3 of the National Agreement, *supra* p. 2. The notes of examinations made by the Postal Service's medical examiner reflect the doctor's conclusions that on August 24 and 26, 1988, Ms. White was fit for duty with lifting and carrying limitations (i.e. light duty). As a result of the controversy, however, Ms. White did not return to work until after the birth of her third child on October 30, 1988.

The Postal Service concedes that there are circumstances where Rural Carriers could be granted a light duty assignment, but they take the position that this has never been the case at the Annapolis Post Office where Ms. White was assigned

(Proposed Finding of Fact 54 of the Defendant Anthony M. Frank).

There was no data produced in the exhibits or at trial on which a finding of racial prejudice could be predicated. The fact that the complainant is black and that a number of the supervisors were white is the sole fact in the record from which such a conclusion could possibly be drawn.

The record is replete with evidence that each controversy arose out of one of the plaintiff's pregnancies and the interpretation of the Agreement by defendant's management representatives. That interpretation necessarily resulted in an adverse impact on the plaintiff, a woman of child bearing years who was a rural letter carrier in the Annapolis Office of the Postal Service.

Conclusion of Law

This case arises under Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.* The defendant Anthony M. Frank is a proper defendant under 42 U.S.C. §2000e-16(c). The U.S. Postal Service is an employer within the meaning of Title VII.

The plaintiff is a member of a protected class. The plaintiff applied for and was denied the light duty assignments she requested in April, 1985, October, 1986 and August, 1988 [Defendant's Findings of Fact 24, 31, 36]. In each instance, the basis for the denial of light duty assignments was the Service's interpretation of Article 13 §3 of the National Agreement which management construed to forbid light duty for rural carriers in the Annapolis Post Office.

As a matter of law, the Service misread and misinterpreted the Agreement. In each instance, the defendant employed the terms of the Agreement to discriminate against the plaintiff on the basis of her sex and her pregnancies.

As a result of the actions of the representatives of the Postal Service, the plaintiff was compelled to use medical and vacation leave at times when defendant could have

accommodated her physical condition with a light duty assignment.

The position of the Postal Service that the Postal Service has "consistently" interpreted the contract clause in question to prohibit the assignment of rural carriers to light duty positions is contradicted by its admission that rural carriers are entitled to be considered for light duty positions. Defendant's explanation that the Agreement does not permit light duty at the Annapolis office, is merely an arbitrary, artificial distinction that cannot negate its liability.

The Supreme Court enunciated the frame work for proving employment discrimination in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800-02 (1973). The plaintiff's has the initial burden of establishing a *prima facie* case of discrimination in the present action. The elements of a *prima facie* case are (1) Plaintiff is a member of a protected class, (2) she applied for and was qualified for light duty in 1985, 1986 and 1988, (3) her requests for light duty were denied, and, (4) similarly situated employees outside of her protected group were granted light duty assignments.

By establishing facts which, if not otherwise explained, demonstrate that defendant's action were more likely than not due to intentional consideration of a statutorily impermissible factor such as sex, the plaintiff has proven a *prima facie* case of employment discrimination. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978).

Where the claimed discriminatory conduct arises in the context of pregnancy, Title VII provides in pertinent part that

> [w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected, but similar in their ability or inability to work .

42 U.S.C. §2000e(k)

If the plaintiff succeeds in establishing a *prima facie* case of discrimination, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If defendant carries its burden, the plaintiff must then persuade the Court either that the discriminatory reason most likely motivated the employer, or that the proffered reason is incredible. *Burdine*, 450 U.S. at 256. The shifting obligations described in the applicable case law never affect the plaintiff's ultimate burden of persuading the trier of the fact.

In the present case, the plaintiff has demonstrated that, in each instance, as a result of physical limitations occasioned by her pregnancies, she was unable to perform the full burden of her duties as a rural carrier. She has therefore established (1) that she is a member of the protected class; (2) that she qualified for light duty and applied for the type of duty in 1985, 1986 and 1988; (3) that her requests for light duty were denied. She has met the fourth prong by demonstrating that the interpretation of the Agreement which was used to deny her light duty clearly permits light duty to other similarly situated rural carriers.

Where the light duty requests were occasioned by pregnancy, the defendant's use of the Agreement to deny light duty assignments to plaintiff is discriminatory. The defendant violated the provisions of Title VII which proscribe discriminatory decisions based upon gender. It is not necessary for the plaintiff to identify a specific *person* who received more favorable treatment under such circumstances. The Service's own testimony and documents make it clear that as a group rural carriers are afforded the privilege of light duty assignments under circumstances similar to those in which it denied the privilege to the plaintiff. The conclusion is inescapable that the Postal Service discriminated against plaintiff on the basis of her sex.

The plaintiff seeks an injunction against further discrimination. In light of the fact that this dispute arose out of unusual circumstances relating to plaintiff's pregnancies, an

injunction is not an appropriate remedy. The plaintiff has also requested reimbursement for all annual leave, sick leave and maternity leave she used because of the Postal Service's discriminatory denial of light duty, together with backpay, litigation costs, and attorney fees. The plaintiff is entitled to have her service record corrected to restore any loss of annual or sick leave *prior* to the birth of each of her three children arising out of the discriminatory conduct. If such credits should fail to completely compensate her for her losses, the Court will give consideration to appropriate reimbursement to make the plaintiff whole. An allowance of back pay is, however, inappropriate.

As plaintiff is the prevailing party, the Court will also consider appropriate attorney fees and costs upon submission of records in support of such a claim.

An appropriate Order should be submitted to the Court to carry out the intent of this Opinion.

DATE: March 10th, 1992

Norman P. Ramsey
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PATRICIA L. WHITE *Plaintiff* v. ANTHONY FRANK Postmaster General United States Postal Service *Defendant*	CIVIL ACTION NO. R-90-1378

DECREE

This Court after a trial on the merits, with appropriate findings and conclusions, has determined that the defendant Postmaster General of the United States engaged in employment practices that have discriminated against the plaintiff Patricia L. White in violation of her sex under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., (hereinafter "Title VII"), as set forth more fully in the Court's Opinion of March 18, 1992. Pursuant to that Opinion, this Court now enters an appropriate decree.

In order to end Defendant's discriminatory practices and to remedy the effects of past discrimination, the Court, being fully advised, has determined that injunctive relief is appropriate. Accordingly, it is hereby **ADJUDGED, DECREED AND ORDERED** that:

The plaintiff's service record be corrected to restore any loss of annual or sick leave prior to the birth of each of her three children. The record reflects the following time off that plaintiff was forced to take off prior to the birth of each of her three children:

PATRICIA WHITE'S COMBINED LEAVE STATUS PRIOR TO THE BIRTH OF HER THREE CHILDREN

YEAR	ANNUAL	SICK	LWOP	SUSPENSION	OTHER[1]
1985	2	7	9	33	4
1986	4	13	19	17	3
1988	3	15	22	43	6
TOTAL	9	35	50	93	13

Plaintiff was off a combined total of 200 days prior to the birth of each of her three children and was compensated only when she was on annual or sick leave status. Forced use of annual and sick leave used by Plaintiff and for which she was compensated totaled 44 days. Uncompensated leave totaled 156 days.

To make plaintiff whole, she shall: 1) be provided the opportunity to repurchase the 44 days of annual and sick leave that she was required to use; 2) be compensated for the 156 days that she was on Leave Without Pay, suspended or otherwise lost pursuant to operation of Postal Service personnel rules and regulations. Finally, any reference in Plaintiff's personnel record that reflects disciplinary actions taken against her, including leave without pay or suspension status should be expunged.

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1. "Other" represents days of annual leave taken from the plaintiff because of the number of days she was on LWOP status or suspended. Postal rules mandate that an employee lose 8 hours (1 day) of annual leave for each 80 hours the employee is on LWOP or suspended status.

Any claim for attorney fees and costs to this Court for consideration shall be held in abeyance until ten (10) days after the time for Defendant to notice an appeal has expired.

SO ORDERED this 1st day of May, 1992.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 15, 1993

PATRICIA L. WHITE
Plaintiff-Appellee,

v.

ANTHONY FRANK,
Postmaster General
Defendant-Appellant

No. 92-1579
CA-90-1378-R

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK